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14 IMMIGRANTS' RIGHTS PROJECT and CENTER

15 FOR GENDER & REFUGEE STUDIES AT THE

16 UNIVERSITY OF CALIFORNIA HASTINGS

17 COLLEGE OF THE LAW

18 UNITED STATES DISTRICT COURT

19 FOR THE NORTHERN DISTRICT OF CALIFORNIA

20 SAN FRANCISCO DIVISION

21 AMERICAN CIVIL LIBERTIES UNION
22 IMMIGRANTS' RIGHTS PROJECT &
23 CENTER FOR GENDER & REFUGEE
24 STUDIES AT THE UNIVERSITY OF
25 CALIFORNIA HASTINGS COLLEGE
26 OF THE LAW,

27 Plaintiffs,

28 v.

U.S. IMMIGRATION AND CUSTOMS
ENFORCEMENT, an agency of the
Department of Homeland Security,

Defendant.

Case No. 3:18-cv-07449

**COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF**

Freedom of Information Act, 5 U.S.C. § 552

I. INTRODUCTION

1. This is an action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, to shed light on the federal government's treatment of asylum seekers. Plaintiffs seek to enforce

1 the public's right to information regarding the federal government's detention of thousands of
2 asylum seekers who recently arrived in the United States, despite an existing agency directive
3 providing for their release.

4 2. On July 23, 2018, Plaintiffs Immigrants' Rights Project of the American Civil
5 Liberties Union ("ACLU") and Center for Gender & Refugee Studies ("CGRS") at the University
6 of California Hastings College of the Law (hereinafter, "Plaintiffs") requested information from
7 U.S. Immigration and Customs Enforcement ("ICE") pertaining to parole decisions for asylum
8 seekers who arrive in the United States via a port of entry or interdiction at sea—or "arriving
9 aliens," *see* 8 C.F.R. §1.2—and are found to have a credible fear of persecution.

10 3. ICE Directive 11002.1 provides that "when an arriving alien found to have a
11 credible fear establishes to the satisfaction of [ICE] his or her identity and that he or she presents
12 neither a flight risk nor danger to the community, [ICE] should"—absent "exceptional, overriding
13 factors"—"parole the alien on the basis that his or her continued detention is not in the public
14 interest." ICE Directive 11002.1, ¶¶ 6.2, 8.3. Plaintiffs filed the instant FOIA requests to enable
15 the public to evaluate the parole decisions for asylum seekers. The records requested would
16 illuminate whether ICE continues to apply the Parole Directive in practice, or instead is
17 subjecting asylum seekers who satisfy the Directive to arbitrary detention. Plaintiffs sought
18 expedited processing of their requests due to the severe deprivations of liberty suffered by
19 individuals in ICE detention, the heightened debate around the treatment of asylum seekers
20 arriving at our borders, and the immediate need to educate the public about ICE's apparent
21 violation of its own Directive.

22 4. Plaintiffs specifically asked for records that ICE is required to maintain pursuant to
23 the Directive, and which ICE has already produced for the time period between 2010 to 2017
24 pursuant to a substantially similar FOIA request and subsequent settlement agreement in *ACLU v.*
25 *ICE*, No. 3:16-cv-06066-JSC (N.D. Cal. Aug. 8, 2017) (ECF No. 56). Yet more than four months
26 since the request was filed, ICE has not responded *at all* to the request. Given the total lack of
27 response to Plaintiffs' FOIA request, Plaintiffs now bring this action to compel disclosure of
28 information to which the public is entitled.

II. PARTIES

5. Plaintiff ACLU is a nationwide, non-profit, non-partisan organization with the mission of protecting civil liberties from government incursions, safeguarding basic constitutional rights, and advocating for open government. It is the largest civil liberties organization in the country, with offices in the fifty states and over 1.75 million members. In support of its mission, the ACLU uses its communications department to disseminate to the public information relating to its mission free of charge, through its website, newsletters, and other publications. The Immigrants' Rights Project ("IRP") of the ACLU is specifically dedicated to expanding and enforcing the civil liberties and civil rights of immigrants—including asylum seekers—and to combating public and private discrimination against them. The ACLU-IRP has offices in both San Francisco, California and New York, New York.

6. Plaintiff CGRS, based at the University of California Hastings College of the Law, is an educational and advocacy organization that works to protect the fundamental human rights of refugees, with a focus on women and children. CGRS engages in litigation, scholarship, research, and development of policy recommendations, in addition to providing in-depth training and technical assistance. Its attorneys are authors of scholarly works, experts who advise in asylum cases, and seasoned practitioners who represent asylum seekers throughout the United States. CGRS is a nationally-recognized leader in the dissemination of legal theories, practice advisories, and human rights reporting. The CGRS website offers a trove of resources for researchers and organizations interested in issues surrounding refugees and asylum.

Acknowledging its value to the public, the Library of Congress selected CGRS's website for its Library Archive Project, describing the website as an important part of the historical record. CGRS is based in the state of California and has its sole office in San Francisco, California.

7. Defendant ICE is a component of the U.S. Department of Homeland Security. ICE is an agency within the meaning of 5 U.S.C. § 552(f). ICE has its headquarters in Washington, D.C., and field offices all over the country, including San Francisco.

III. JURISDICTION

8. This Court has federal subject matter jurisdiction over this action and personal

jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). Because this action arises under FOIA against an agency of the United States, this Court also has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1346.

IV. VENUE

9. Venue lies in this district pursuant to 28 U.S.C. § 1402 and 5 U.S.C. § 552(a)(4)(B). Plaintiffs reside or have their principal places of business in this district.

V. INTRADISTRICT ASSIGNMENT

10. Assignment of this action to the San Francisco Division of this Court is warranted pursuant to Civil L.R. 3-2. Plaintiff CGRS is based in San Francisco, California and Plaintiff ACLU-IRP is based, in part, in San Francisco, California. The field office of ICE that is responsible for immigrant detention and removal activities in Northern California is located in San Francisco, California.

VI. BACKGROUND

A. The Federal Government's Treatment of Asylum Seekers is a Matter of Significant Public Interest.

i. The 2009 Parole Directive

11. Many detained asylum seekers are “arriving aliens,” or noncitizens who are arrested upon arrival at a port of entry or who are interdicted at sea. *See* 8 C.F.R. §1.2. Under the Immigration and Nationality Act, arriving noncitizens who lack facially valid documents or are inadmissible due to fraud are immediately returned to their countries of origin through the “expedited removal” process, “unless the alien indicates . . . a fear of persecution.” 8 U.S.C. 1225(b)(1)(A)(i). Such persons are referred for an interview with an asylum officer to determine if they have a “credible fear”—that is, a “significant possibility” that they are eligible for asylum, withholding of removal, or relief under the Convention Against Torture. 8 U.S.C. § 1225(b)(1)(A)(ii); (B)(iii), (B)(v); 8 C.F.R. § 208.30(e). Noncitizens who establish a credible fear are then referred for a full removal hearing before an Immigration Judge inside the United States to adjudicate their claims for protection. 8 U.S.C. § 1225(b)(1)(B)(ii); 8 C.F.R. § 1235.6(a)(1).

12. By regulation, “arriving aliens” in removal proceedings are not eligible for a bond

1 hearing before an Immigration Judge, 8 C.F.R. § 1003.19(h)(2)(i), and are instead limited to
2 seeking discretionary release from ICE on parole. *See* 8 U.S.C. § 1182(d)(5); 8 C.F.R. § 235.3(c).
3 Thus, unless ICE grants parole, arriving asylum seekers who establish a credible fear must litigate
4 their immigration cases from detention, in many cases for months or even years.

5 13. Immigration detention is civil, and not criminal in nature, and thus may not have a
6 punitive purpose. Rather, the purpose of immigration detention is to ensure the individual's
7 appearance for removal proceedings and also to prevent risk to public safety. *See Zadvydas v.*
8 *Davis*, 533 U.S. 678, 690 (2001).

9 14. For years, ICE routinely detained arriving asylum seekers despite their having
10 established a credible claim to asylum and posing no danger or flight risk warranting their
11 imprisonment. ICE held many of these individuals—who have often suffered severe persecution
12 and trauma—in harsh, prison-like conditions. Human rights reports have widely documented the
13 serious harms resulting from such detention, including interference with the ability to obtain
14 counsel and litigate asylum claims effectively; lack of access to medical treatment; and severe
15 harm to asylum seekers' mental health.

16 15. ICE faced widespread public criticism for its detention policies. In particular, a
17 2005 governmental study by the U.S. Commission on International Religious Freedom
18 ("USCIRF")—an independent, federal, bipartisan commission—determined that prison-like
19 confinement of asylum seekers was both inappropriate and unnecessary. Moreover, USCIRF
20 found that ICE was not making fair, consistent, or accurate parole decisions for asylum seekers.
21 USCIRF recommended significant reforms to ICE's detention practices, including the
22 codification of ICE's parole standards into regulations and creation of standardized forms and
23 national review procedures to ensure fair decision-making.¹

24 16. ICE did not meaningfully act on USCIRF's recommendations even in part until
25 December 2009, when it issued ICE Directive 11002.1, Parole of Arriving Aliens Found to Have

26
27 ¹ *See* USCIRF, *Report on Asylum Seekers in Expedited Removal, Vol. I: Findings &*
28 *Recommendations* 60-62, 67-68 (Feb. 2005),
http://www.uscirf.gov/sites/default/files/resources/stories/pdf/asylum_seekers/Volume_I.pdf.

a Credible Fear of Persecution or Torture (“the Parole Directive”).² The Parole Directive instructs that “when an arriving alien found to have a credible fear establishes to the satisfaction of [ICE] his or her identity and that he or she presents neither a flight risk nor danger to the community, [ICE] should”—absent “exceptional, overriding factors”—“parole the alien on the basis that his or her continued detention is not in the public interest.” *Id.* ¶¶ 6.2, 8.3. The Directive also established procedures for documenting, reviewing, and reporting on parole decisions. *Id.* ¶¶ 8.4-8.12.

17. The Directive reflects the agency’s recognition that there is no public interest in detaining *bona fide* asylum seekers who have credible claims to asylum and present no danger to the community or flight risk that warrants their imprisonment.

18. After the Directive went into effect in January 2010, large numbers of arriving asylum seekers were paroled from detention. Indeed, ICE touted the Directive as one of its major “Detention Reform Accomplishments.”³

ii. ICE’s Abandonment of the Parole Directive

19. However, ICE has abruptly changed course and returned to its practice of routinely denying parole to asylum seekers, even when they meet the Parole Directive’s criteria. Indeed, under the Trump administration, the Parole Directive “appears to exist merely on paper and not in practice.”⁴

20. Indeed, several federal courts recently have found that ICE Field Offices across the country have arbitrarily detained asylum seekers without individualized parole reviews, in violation of the Parole Directive. *See Damus v. Nielsen*, 313 F. Supp. 3d 317, 339-43 (D.D.C. 2018) (finding that plaintiffs were likely to show that five defendant ICE Field Offices had adopted a *de facto* “no parole” policy and granting a class-wide preliminary injunction); *accord Abdi v. Duke*, 280 F. Supp. 3d 373, 403-410 (W.D.N.Y. 2017) (same, for ICE Field Office in

² https://www.ice.gov/doclib/dro/pdf/11002.1-hdparole_of_arriving_alien_found_credible_fear.pdf.

³ *See ICE, Detention Reform*, Jan. 2010, <https://www.ice.gov/detention-reform#tab1>.

⁴ Human Rights First, *Judge and Jailer: Asylum Seekers Denied Parole in Wake of Trump Executive Order 1* (Sept. 2017), <https://www.humanrightsfirst.org/sites/default/files/hrf-judge-and-jailer-final-report.pdf>.

upstate New York); *Aracely R. v. Nielsen*, 319 F. Supp. 3d 110, 145-57 (D.D.C. 2018) (granting preliminary injunction to individual asylum seekers detained in Texas).

21. Government data and reports from service providers confirm that, under the Trump administration, ICE has used the parole process to rubberstamp asylum seekers' arbitrary detention. For example, in *Damus v. Nielsen*, government statistics showed that from February to September 2017, three of the defendant ICE Field Offices *denied 100% of parole applications*, and the two other defendant Field Offices *denied 92% and 98% of applications*—despite the fact that (1) only a few years ago, those same Field Offices *granted more than 90% of parole applications*, and (2) there has been no demonstrated change in the types of individuals seeking asylum in the United States. *Damus*, 313 F. Supp. 3d at 339.

22. This data has been confirmed by practitioners. For example, the court in *Damus* cited evidence of ICE officers informing immigration attorneys that “there is no more parole” and that the agency is “not granting parole.” *Id.* at 340. Indeed, the government’s own submissions revealed that ICE was providing sham parole reviews. *See, e.g., id.* at 341 (citing example of plaintiff denied parole due solely to her status as a “recent entrant” to the U.S., despite the fact this characteristic applies categorically to asylum seekers who pass a credible fear screening); *id.* (citing plaintiffs who “received letters advising them of the right to apply for parole only one day prior to receiving nearly identical boilerplate letters informing them of parole denial”); *id.* (noting asylum seekers who were never provided a parole interview by ICE, as required by ICE’s own parole directive); *id.* (finding that ICE’s “summary and often boilerplate” parole denials failed to show individualized parole determinations). *See also Abdi*, 280 F. Supp. 3d at 404-05 (citing evidence that asylum seekers were “*never* provided with any paperwork explaining how to seek parole” and were “denied multiple requests for parole via perfunctory form denials”); *Judge and Jailer, supra*, at 11-15 (documenting arbitrary parole denials).

23. The Trump administration’s evisceration of the parole process is consistent with its use of detention to deter asylum seekers—and particularly those arriving at the U.S.-Mexico border—from coming to the United States, and its efforts to end to what it calls the policy of “catch and release.” *See, e.g.,* Executive Order No. 13767, Border Security and Immigration

1 Enforcement Improvements, 82 Fed. Reg. 8793, 8793 (Jan. 30, 2017) (making it the policy of the
 2 Executive Branch to “detain individuals apprehended on suspicion of violating . . . Federal
 3 immigration law”); Memorandum of John Kelly, DHS Secretary, Feb. 20, 2017,
 4 [https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf)
 5 [Border-Security-Immigration-Enforcement-Improvement-Policies.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf) (calling for the end of
 6 “[p]olicies that facilitate the release of removable aliens apprehended at and between the ports of
 7 entry . . . collectively referred to as ‘catch-and-release’”); White House Framework on
 8 Immigration Reform & Border Security (Jan. 25, 2018), [https://www.whitehouse.gov/briefings-](https://www.whitehouse.gov/briefings-statements/white-house-framework-immigration-reform-border-security/)
 9 [statements/white-house-framework-immigration-reform-border-security/](https://www.whitehouse.gov/briefings-statements/white-house-framework-immigration-reform-border-security/) (pledging to “[d]eter
 10 illegal entry” by ending “catch-and-release”).

11 24. In fall 2018, the Trump Administration dramatically escalated its policies to deter
 12 and punish asylum seekers, reacting harshly to a “caravan” of Central American men, women,
 13 and children traveling to the U.S.-Mexico border.⁵ In a November 1, 2018 speech, Trump
 14 reiterated his intention to end “catch-and- release,” and announced his plan to detain asylum
 15 seekers in “massive cities of tents.” Remarks by President Trump on the Illegal Immigration
 16 Crisis and Border Security (Nov. 1, 2018), *available at* [https://www.whitehouse.gov/briefings-](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/)
 17 [statements/remarks-president-trump-illegal-immigration-crisis-border-security/](https://www.whitehouse.gov/briefings-statements/remarks-president-trump-illegal-immigration-crisis-border-security/). That same week,
 18 Trump announced sending over 5,000 active military troops to the border to counter what he
 19 termed an “invasion” of asylum seekers.⁶

20 25. In early November, the Trump Administration issued a presidential Proclamation
 21 and Regulation that together bar asylum seekers who enter between ports of entry from asylum
 22 eligibility. *See* Department of Justice (“DOJ”) and Department of Homeland Security (“DHS”),
 23 *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for*
 24 *Protection Claims*, 83 Fed. Reg. 55,934 (Nov. 9, 2018) (to be codified at 8 C.F.R. pts. 208, 1003,

25
 26 ⁵ *See* Amnesty International, Key facts about the migrant and refugee caravans making their way
 to the USA (Nov. 16, 2018), *available at* [https://www.amnesty.org/en/latest/news/2018/11/key-](https://www.amnesty.org/en/latest/news/2018/11/key-facts-about-the-migrant-and-refugee-caravans-making-their-way-to-the-usa/)
 27 [facts-about-the-migrant-and-refugee-caravans-making-their-way-to-the-usa/](https://www.amnesty.org/en/latest/news/2018/11/key-facts-about-the-migrant-and-refugee-caravans-making-their-way-to-the-usa/).

28 ⁶ *See* Michael D. Shear and Thomas Gibbons-Neff, “Trump Sending 5,200 Troops to the Border
 in an Election-Season Response to Migrants,” *New York Times* (Oct. 29, 2018), *available at*
<https://www.nytimes.com/2018/10/29/us/politics/border-security-troops-trump.html>.

1208) (establishing asylum ineligibility for any individual whose entry is barred pursuant to the President’s authority under the Immigration and Nationality Act, 8 U.S.C. §§1182(f), 1185(a)); Presidential Proclamation Addressing Mass Migration Through the Southern Border of the United States (Nov. 9, 2018), *available at* <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-addressing-mass-migration-southern-border-united-states/> (invoking 8 U.S.C. §§1182(f), 1185(a) to bar entry of asylum seekers between ports of entry). Thus, under the Proclamation and Regulation—should they be permitted to go into effect⁷—only asylum seekers who enter at ports of entry will be eligible for asylum.

26. ICE’s practices have subjected thousands of asylum seekers to arbitrary detention, in violation of their constitutional and legal rights. For example, Amos Yee, an 18-year-old blogger and outspoken critic of the government of Singapore, was sent to detention after requesting protection at the airport in Chicago. Yee’s activism and persecution has been publicly documented by Human Rights Watch and PEN America. ICE initially indicated Yee would be released on parole after he passed his credible fear screening. However, after the issuance of President Trump’s executive order on border security, ICE advised that Yee would not be released from detention. While an immigration judge ruled that he was eligible for asylum, ICE decided to appeal that decision and refused to release him from immigration detention. Yee was detained for nine months at three different jails in the Midwest and only released after the Board of Immigration Appeals, in a unanimous three-member decision, dismissed ICE’s appeal.⁸

27. ICE’s shift in detention policy also raises serious fiscal concerns. Detaining asylum seekers is far more expensive than supervising them through alternatives to detention—such as supervised release programs—which have been proven highly effective in ensuring appearance for court proceedings. The average cost of detention per day in FY 2017 for U.S. taxpayers, not including expenditures toward agency-wide overhead, was \$195 per person. By

⁷ The interim regulation was recently enjoined pursuant to a temporary restraining order by this Court. *See East Bay Sanctuary Covenant v. Trump*, No. 18-cv-06810-JST, 2018 WL 6053140 (N.D. Cal. Nov. 19, 2018).

⁸ *Judge and Jailer*, *supra* n.4, at 12-13.

contrast, the average daily cost of supervision through ICE’s alternatives to detention program (“ATD”) in FY 2017 was approximately \$6.⁹ Immigrants participating in “full service” ATD programs have appeared for their final hearings more than 95% of the time.¹⁰

28. The public continues to manifest heightened concern over the treatment of asylum seekers who arrive at our borders, including over detention practices.

29. For these reasons, immediate disclosure of the records requested is critical to ensure a full public accounting of the government’s shift in detention policy.

VII. FACTS AND PROCEDURAL HISTORY

30. On July 23, 2018 Plaintiffs sent ICE a FOIA request seeking monthly reports, for the period between January 2018 to the month when ICE provides its final response to the FOIA request, by the ICE Field Office Directors detailing the number of parole adjudications for each area of responsibility; the result of those adjudications; and the underlying basis to grant or deny parole. *See* ICE Directive 11002.1 ¶8.11; *see also* Exhibit A (Plaintiffs’ subject FOIA request).

31. Plaintiffs also sought a full fee waiver and expedited processing of both requests on the grounds that there was a “compelling need” for such treatment: namely, an “urgency to inform the public concerning . . . actual or alleged Federal Government activity.” *See* Exhibit A, at 5-7; *see also* 5 U.S.C. § 552(a)(4)(A)(iii), (a)(6)(E)(i)(I), & (a)(6)(E)(v)(II).

32. FOIA requires that each agency “shall make [disclosable] records promptly available” upon request. *See* 5 U.S.C. § 552(a)(3)(A). As of the date of this filing, ICE has not responded to Plaintiffs’ request.

A. ICE’s Failure to Respond to Plaintiffs’ Request

33. ICE has not responded – more than four months after the request was filed – to Plaintiffs’ request.

34. Upon receipt of a request that will take longer than ten days to process, the FOIA requires agencies to provide requesters with individualized tracking numbers and to maintain a

⁹ Laurence Benenson, National Immigration Forum, *The Math of Immigration Detention, 2018 Update: Costs Continue to Multiply* (May 9, 2018), <https://immigrationforum.org/article/math-immigration-detention-2018-update-costs-continue-multiply/>.

¹⁰ *Id.*

1 telephone line or Internet service to provide information about the status of a request, including
 2 the estimated date of its completion. *See* 5 U.S.C. § 552(a)(7). ICE did not provide any
 3 individualized tracking number for Plaintiffs' request.

4 35. ICE's 20 business days to make a "determination" on Plaintiffs' Request elapsed
 5 on August 20, 2018. *See* 5 U.S.C. §552(a)(6)(A)(i); 5 U.S.C. §552(a)(6)(C)(i); *Coleman v. Drug*
 6 *Enf't Admin.*, 714 F.3d 816, 820, 823-24 (4th Cir. 2013). Accordingly, Plaintiffs have exhausted
 7 their administrative remedies with respect to their Request.

8 **VIII. CLAIM FOR RELIEF**

9 36. Plaintiffs re-allege and incorporate, as fully set forth herein, each and every
 10 allegation contained in the above paragraphs.

11 37. ICE has failed to conduct an adequate search, has wrongfully withheld agency
 12 records requested by Plaintiffs under the FOIA, and has failed to comply with the statutory time
 13 for the processing of FOIA requests.

14 38. ICE has failed to respond to Plaintiffs' request for expedited processing.

15 39. Plaintiffs have constructively exhausted the applicable administrative remedies
 16 because ICE has failed to respond to Plaintiffs' request entirely.

17 40. Plaintiffs are entitled to injunctive relief with respect to the release and disclosure
 18 of the requested documents because ICE continues to improperly withhold agency records in
 19 violation of FOIA. The Plaintiffs will suffer irreparable injury from, and have no adequate legal
 20 remedy for, ICE's illegal withholding of government documents pertaining to the subject of
 21 Plaintiffs' FOIA requests.

22 41. Plaintiffs are entitled to declaratory relief because an actual controversy exists
 23 regarding ICE's failure to meet its obligations under FOIA.

24 **IX. PRAYER FOR RELIEF**

25 WHEREFORE, Plaintiffs pray for judgment against ICE as follows:

26 a. For declaratory relief declaring that ICE's failure to disclose the records requested
 27 by Plaintiffs violates FOIA, 5 U.S.C. § 552;

28 b. For injunctive relief ordering ICE to expeditiously conduct an adequate search for

1 all records responsive to Plaintiffs' FOIA requests; and to expeditiously and appropriately
2 disclose, as soon as practicable, all responsive, non-exempt records;

3 c. For Plaintiffs' reasonable attorney fees and other litigation costs reasonably
4 incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and

5 d. For such other relief as the Court may deem just and proper.

6
7 Dated: December 11, 2018

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4831-2854-8730, v. 6